

PEDAGOGICAL EXHIBITS AND SUMMARIES

By

Judge Robert E. Larsen

I. Pedagogical Exhibits

Pedagogical devices are not evidence themselves but are aids to help the jury in understanding evidence that has already been admitted. When they take the form of charts or summaries, they may include witnesses' opinions and conclusions, and may even draw inferences to assist the jury in understanding evidence. 6 Weinstein's Federal Evidence §1006.04[2] (Joseph M. McLaughlin ed., 2d ed. 2008). Displaying such charts is within the discretion of the trial judge under Federal Rule of Evidence 611(a), which states, in part, that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of the truth" If pedagogical charts are displayed, they should not be admitted as evidence and should be accompanied by a jury instruction along these lines:

Certain charts and summaries have been shown to you solely to help explain the facts disclosed by the books, records, and other documents which are evidence in this case. These charts and summaries are not evidence or proof of any facts. You should determine the facts from the evidence.

United States v. Ogba, 526 F.3d 214, 225 (5th Cir. 2008); *United States v. Howard*, 774 F.2d 838, 844 n.4 (7th Cir. 1985).

II. Summaries

Confusion sometime arises when a pedagogical chart is mistaken for a summary chart under Federal Rule of Evidence 1006. That Rule allows a summary to be admitted as a surrogate for underlying voluminous exhibits. Rule 1006 provides:

The contents of voluminous writings, recordings, or photographs, which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

The purpose of Rule 1006 is to reduce the volume of exhibits being introduced into evidence by allowing accurate summaries in their place. See *United States v. Bakker*, 925 F.2d 728, 736 (4th Cir. 1991). Because the underlying exhibits need not be admitted into evidence, the chart itself becomes the evidence on which the trier-of-fact may rely in reaching the verdict.

Summary charts under Rule 1006 are distinguishable from pedagogical charts under Rule 611(a) in that the summary chart is evidence, while the pedagogical chart is merely a device to facilitate the presentation and comprehension of the evidence already in the record. Examples of pedagogical devices include: a chart that shows the conspiracy between two of the alleged co-conspirators; a chart that shows a time line comparing dates and payments received from workers' compensation with defendant's activities while receiving those benefits; an organizational chart of the alleged conspirators; transparencies summarizing witness testimony; a chart summarizing deposits and withdrawals from defendant's checking account; and transparencies of blood-spatter evidence at a murder scene.

III. Pedagogical Summaries

More confusion between Rule 1006 summaries and Rule 611(a) pedagogical charts may result when the chart combines characteristics of both. 6 Weinstein's Federal Evidence §1006.04[2] (Joseph M. McLaughlin, ed., 2d ed. 2008). This type of hybrid chart may not comply with all of Rule 1006's requirements, but yet may be sufficiently accurate and helpful to the jury under Rule 611(a) that the judge admits it. *Id.* This third type of chart is called a "secondary-evidence" summary. *Id.* For example, although the plain language of Rule 1006 does not specifically allow summaries of testimonial evidence, some courts have permitted such use in conspiracy cases to aid the jury "[in] put[ting] the myriad of complex and intricate pieces of testimonial and documentary evidence comprising the puzzle together" *United States v. Taylor*, 210 F.3d 311, 315 (5th Cir. 2000). When used, the trial judge should instruct the jury that the chart is not itself independent evidence, but is only as reliable as the underlying evidence it purports to summarize.

IV. Q & A on Summaries

1. What Is the Evidentiary Foundation for a Summary?

To be admissible, a summary must be fair, accurate and properly authenticated as such by a witness - normally the person who prepared the summary.

2. What Is the Problem a Summary Is Designed to Address?

When there are a large number of documents, recordings, photographs or other evidentiary items, the trier-of-fact will have to sift through and figure out their relevance. Summaries are designed to provide a structure to the evidence.

3. What Should a Lawyer Do When There Is a Large Number of Related Exhibits?

Engage a witness to prepare a summary of the documents, recordings, photographs or other evidentiary items. Unless the summary is the subject of a stipulation by the parties, the proponent of the exhibit must call a witness to authenticate it as "fair and accurate," and testify to the contents of the summary exhibit.

4. Under What Circumstances May a Summary Be Admitted in Evidence?

Under the Rule, the standard is whether it would be *inconvenient* for the trier of fact to review the underlying materials in court to justify a summary. It need not be impossible.

5. Must the Opposing Side Be Given Advance Notice of the Summary Exhibit?

Yes. The proponent of a summary must give notice to the opposing side of the intent to use the summary, provide the summary to the opposing side in advance of trial, and make the underlying materials available for review by the opposing side at a reasonable time and location.

6. What Happens When There Are Disputes About the Summary Exhibit?

Disputes as to the accuracy and general fairness of the summary should be resolved by the judge before trial. Fed. R. Evid. 104(a) (providing in part that “[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . .”).

7. How Should a Lawyer View the Evidentiary Foundation for a Summary Exhibit?

Think of the summary as having three component parts:

- (1) The underlying materials to be summarized;
- (2) The summary exhibit itself; and
- (3) The authenticating witness.

As mentioned, both the underlying materials and the summary exhibit must be made available to the opposing side in advance of the judicial proceedings to allow the other party to check it for fairness and accuracy. Under the Rule, the underlying materials need to be admissible in evidence *but do not necessarily have to be admitted at trial*. If the underlying exhibits are not offered and admitted in evidence, they cannot be sent to the jury room.

The summary chart must be both accurate and unbiased to be admissible.

The witness must be able to testify about the data or information summarized in the exhibit, and to the fairness and accuracy of the summary. This witness is usually the person who reviewed the underlying materials and prepared the summary.

8. Is a Jury Instruction Required When Offering a Summary in Evidence?

No. Although jury instructions are readily available in most circuits, no instruction on the jury’s use of the summary must be given since, under Fed. R. Evid. 1006, the summary itself is normally in evidence.

9. Does a Summary Go Back to the Jury Room for Deliberations?

Perhaps. Charts and summaries admitted under Fed. R. Evid. 1006 may be sent to the jury room for deliberations at the trial judge's discretion.

10. What Are the Foundational Steps for a Summary?

The foundational requirements for the admission of a summary are:

- (1) Ask whether the witness has reviewed the exhibits, recordings or photographs;
- (2) Ask whether the witness has summarized the contents of the exhibits, recordings or photographs;
- (3) Hand the summary to the witness and ask him or her to identify it;
- (4) Ask whether the summary fairly and accurately reflects the contents of the exhibits, recordings or photographs;
- (5) Ask whether the summary and its supporting exhibits, records or photographs have been made available to opposing counsel for examination in advance of their production in court; and
- (6) Offer the summary into evidence.

11. What Are Some Trial Tips for Using Summaries at Trial?

The person who prepared the summary chart will usually testify at trial about the manner of preparation and the exhibits summarized by the chart. In composing the chart, the preparer should follow these rules:

- (1) The chart must fairly and accurately summarize the underlying exhibits;
- (2) The chart must be based on admissible underlying exhibits, although the underlying exhibits do not necessarily need to be in evidence so long as they have been available to opposing counsel for review;
- (3) The chart should not contain any headings or captions that are argumentative or prejudicial;
- (4) The chart should not include any assumptions or conclusions;
- (5) The chart should be simple and easy to understand; and
- (6) The chart should be large enough so that everyone (i.e., the witness, the judge, the

jury and the parties) can see it while the witness testifies.

Avoid professionally prepared enlargements of summaries, such as those made of cardboard. Normally, these are very expensive to prepare and do not readily lend themselves to editing or amendment if a piece of underlying evidence is unexpectedly ruled inadmissible by the judge at trial.

Create the summary on a computer and use an overhead transparency machine or Elmo machine to publish it. These machines are readily available, inexpensive to use, allow for easy editing of written material during trial, and are effective in displaying information in the courtroom.

The summary's proponent should attempt to secure a stipulation from the opposing side as to the foundational elements for the underlying materials and the chart. With these elements stipulated, the proponent may focus the questioning on substantive matters dealing with the summary.